No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and
DJAKARTA LLOYD, P.N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION OF FREDERICO RODRIGUEZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. On the facts of petitioner, Frederico Rodriguez' longshoreman's personal injury case, subject to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901 *et seq.* (1927), was there an assignment by operation of LHWCA § 933(b) of "all right" of petitioner against third-party respondents as a result of petitioner's applying to the United States Department of Labor, Office of Workers' Compensation Programs ("OWCP") and later accepting, a "settlement award," disposing of a controverted compensation claim and resulting in payment by the employer of additional compensation for temporary total and permanent partial disability, upon petitioner's admitted failure to thereafter bring suit against "third party" respondents, allegedly responsible for the injury for which compensation was paid, within six months of acceptance of an "award" of such additional compensation?

2. Assuming that an assignment occurred, should it be given effect when petitioner failed to establish, despite opportunity afforded him by the district court, an actual "conflict of interests" between himself and his employer; or should it be denied effect on the basis of a presumption of the existence of a sufficient interests conflict by virtue of the failure, for whatever reason, of the employer to sue respondents, in petitioner's right, to recover damages on account of the injury for which petitioner has received compensation?

Table of Contents

	PAGE
Questions Presented	i
Statutes Involved	2
Statement of the Case	2
Reasons for Denying Writ	9
Conclusion	27

Table of Cases

American Stevedores, Inc. v. *Porello,* 330 U.S. 446 (1947) 11, 16, 17, 18, 21, 22, 27

Baccile v. *Halcyon Lines,* 89 F. Supp 765 (E.D.Pa. 1950), rev'd, 187 F.2d 403 (3rd Cir. 1951) 18

Bloomer v. *Liberty Mutual Ins. Co.,* — U.S. — , 100 S.Ct. 952, 63 L.Ed.2d 215 (1980) 15, 19, 24

Caldwell v. *Ogden Sea Transport, Inc.,* 618 F.2d 1037 (4th Cir. 1980) 8, 9, 10, 11, 12, 14, 15, 21, 23, 24, 26

Celanese Corp. of America v. *John Clark Industries, Inc.,* 214 F.2d 551 (5th Cir. 1954) 24

Cooper Stevedoring Co., Inc. v. *Fritz Kopke, Inc.,* 417 U.S. 106, 110 (1974) 19

Cupo v. *Isthmian S.S. Co.,* 56 F. Supp. 45 (S.D.N.Y. 1941) 16

Czaplicki v. *The Vessel "S.S. Hoegh Silvercloud,"* 351 U.S. 525 (1956) 5, 12, 13, 14, 15, 20, 21, 22, 23, 26, 27

Edmonds v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) 25

Federal Marine Terminals Inc. v. *Burnside Shipping Co., Ltd.,* 394 U.S. 404, 417-418 (1969) 19, 25

Fontana v. *Pennsylvania R. Co.,* 106 F. Supp. 461 (S.D.N.Y. 1952), aff'd, 205 F.2d 151 (2d Cir. 1953) 19

PAGE

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) reversing *sub nom.* 187 F.2d 403 (3rd Cir. 1951) 18, 19, 20, 21, 22, 25

In Re Seaboard Shipping Corporation, 449 F.2d 132 (2d Cir. 1971) 17

Intercounty Construction Corporation v. *Walter*, 422 U.S. 1 (1975) 8

Johnson v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) 9

Landon v. *Lief Hoegh And Co., Inc.*, 521 F.2d 756 (2d Cir. (1975), cert. sought on other grounds and denied, 423 U.S. 1053 (1976), reh. den., 424 U.S. 935 (1976) 25

Liberty Mutual Insurance Co. v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) 10

McClendon v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965) 9

Pope & Talbot Inc. v. *Hawn*, 346 U.S. 406 (1953) 18, 19, 20, 21, 22, 25

Potomac Electric Power Co. v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) 9

Frederico Rodriguez v. *Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N.*, 456 F. Supp. 1014 (S.D.N.Y. 1978), aff'd, 617 F.2d 955 (2d Cir. 1980) 1, 2

Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 13, 14, 20, 23

The Etna, 138 F.2d 37 (3rd Cir. 1943) 19

Toomey v. *Waterman S.S. Corporation*, 123 F.2d 718 (2d Cir. 1941) 16

Valentino v. *Rickners Rhederei, G.M.B.H.*, 552 F.2d 466 (2d Cir. 1977) 23

Virginia Electric & Power Co. v. *Westinghouse Electric Corp.*, 485 F.2d 78 (4th Cir. 1973) 24

Table of Authorities

PAGE

H.R. Rep. No. 1945, 75th Cong., 3rd Sess. (1938) 16

S. Rep. No. 92-1125, 92nd Cong. 2nd Sess. 4 (1972) 24

S. Rep. No. 428, 86th Cong., 1st Sess., reprinted in [1959] U.S. Code Cong. and Ad. News 2134-35 .....14, 15

Statutes

Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. § 901 *et seq* i

33 U.S.C. § 905 ..... 5, 19, 22, 25

33 U.S.C. § 908 6

33 U.S.C. § 914 .....6, 10, 16, 18

33 U.S.C. § 933 .....i, 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27

44 Stat. 1440 15

52 Stat 1168 13

73 Stat. 391 .....9, 13, 22

86 Stat. 1262 ..... 2, 22

Rules

Federal Rules of Civil Procedure:

Rule 12 4

Rule 17 .....1, 2, 4, 8, 9, 11, 12, 24

Rule 56 ..... 4, 5

Regulations

Codes of Federal Regulations:

20 C.F.R. § 702.312 8

20 C.F.R. § 702.315(a) 4, 7, 8

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Respondents respectfully request this Court deny the petition for writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Second Circuit (617 F.2d 955) dated March 19, 1980 affirming the opinion of the United States District Court, Southern District of New York dated September 12, 1978 (456 F. Supp. 1014) and final order of December 6, 1978 dismissing this longshoreman's personal injury suit on grounds of § 933(b), the "assignment" provision of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. (hereinafter "LHWCA"), and Fed.R.Civ.P. 17(a).

STATUTES INVOLVED

Involved in this case are Fed.R.Civ.P. 17(a) the "real party in interest" rule and LHWCA § 933(b) which provides as follows:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

This action[1] involves a claim of damages for personal injuries sustained by Frederico Rodriguez, a longshoreman employed by International Terminal Operating Co., Inc. (2e)[2] (hereinafter the "employer") on September 4, 1973.[3] At that time, plaintiff and other co-employees of the contract stevedore were unloading a shipment of coffee from

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1. *Frederico Rodriguez* v. *Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N.*, Second Circuit Court of Appeals, Index No. 79-7132. This appeal was argued jointly with a number of others involving the same or similar issues, although never consolidated by the Second Circuit. Nonetheless, Rodriguez presents his petition joined with that of two other longshoremen/plaintiffs in a single petition filed under one index number, despite which all of the respondents listed in petitioners' caption will answer, each in their turn, to the appropriate petitioner, in the belief that the circumstances so require. This confusion, of petitioner's making, may be compounded since attorneys for Compass, Djakarta Lloyd and Ayra National Shipping Line, Ltd. (in Second Circuit Civil No. 79-7632) do not represent Ove Skou, R.A., respondent in the case once bearing Second Circuit Index No. 79-7630.

2. References suffixed by letter (e) refer to Appendix E, part of the supplemental appendix. Those suffixed by letter "a" refer to pages in Appendix A made physicially part of the petition.

3. *After* the effective date of the 1972 Amendments to the LHWCA, 86 Stat. 1262.

the No. 2 hatch of respondents' vessel, S/S SOUTH BREEZE, which was then docked at a pier in Brooklyn, New York (2e).

S/S SOUTH BREEZE was owned by respondent, Compass Shipping Company Ltd. ("Compass") and was at the time of petitioner's injury being operated under bareboat charter to respondent, Djakarta Lloyd, P.N. ("Djakarta Lloyd") (2e). According to petitioner, he injured himself when in the course of leaving work he climbed up the ladder from the vessel's No. 2 hatch and upon reaching the level of the main or weather deck, put his foot into a "hole" (actually the accessway leading to the No. 3 hatch on the other side of the common bulkhead between these two hatches) above the ladder which descended into the adjacent No. 3 hatch (*id.*).

Following his injury petitioner made claim against his employer under the LHWCA which eventually caused "some form of dispute" requiring the attention of the OWCP, United States Department of Labor (6e). The resulting consideration before that agency at a so-called informal conference led to settlement of petitioner's remaining compensation claims, for among other things permanent partial disability benefits for the supposed permanent effects of an injury originally diagnosed as a "contusion and puncture" wound, which settlement entailed payment of $2,623.03. This amount represented the "total agreed upon compensation" of $3,610.21, less amounts previously paid, as well as an "approved fee" for plaintiff's compensation representative (19e).

This settlement was embodied in an OWCP form reciting that: "[w]e, the undersigned, having attended an informal conference, and having received a copy of the [within] signed agreement, in this case on 11/4/74 (sic) agree, by the issuance of a compensation order, to the following disposition" (6e).

As the district court noted (*id.*) the settlement indicated the specifics of the disposition and concluded: "the employer-carrier shall make payment promptly following the conference, without regard to the receipt of the formal order, in accordance with § 702.315(a) of the Regulations [20 C.F.R. § 702.315(a)]." As the district court also found, this document was signed by the petitioner, his representative, a representative of the employer and a United States Department of Labor, OWCP "claims examiner" (*id.*).

As is also recited in the district court's opinion, "[petitioner] does not dispute that he received compensation for his injuries from his employer, or that he instituted suit against . . . [respondents] more than six months after the [above described] settlement agreement or receipt of the compensation [paid thereunder]" (6e-7e). In fact, petitioner started suit against the shipowner Compass alone by filing a complaint alleging negligence in the United States District Court, Southern District of New York on June 2, 1976 (3e), little more than three months before lapse of three years from the occurrence of the injury in suit and about nineteen months after settlement and payment of his compensation claim.

On April 16, 1978 respondents moved to dismiss plaintiff's complaint seeking judgment on the pleadings and/or summary judgment pursuant to Fed.R.Civ.P. 12, 17 and 56. This motion was based on the § 933(b) assignment of "all right" of the petitioner to his employer six months after acceptance of an "award" of compensation "in an order filed by the deputy commissioner or [Benefits Review] Board," as a result of which petitioner was said by respondents not to be the real party in interest with respect to the subject matter of this suit. At the same time, respondents moved in the alternative for summary judgment on the question of whether, assuming petitioner's standing to sue, the negli-

gence alleged by plaintiff was actionable under LHWCA § 905(b), pursuant to which this suit was brought. The basis of this aspect of respondents' dismissal motion was that respondents were not liable for petitioner's injury in light of his total inability to account at his pre-trial deposition for the occurrence of his injury in terms other than some supposed unseaworthy condition, or on basis of his own entire fault.[4]

On September 12, 1978 the district court (Hon. Robert L. Carter) denied that part of respondents' summary judgment motion seeking determination that actionable fault could not be shown on ground of the existence of a question of fact regarding respondents' liability for the occurrence of petitioner's injury, while reserving judgment, pending discovery, on the motion to dismiss on grounds of § 933(b) assignment. The district court allowed petitioner sixty days to effect discovery to afford an opportunity to demonstrate the existence of a conflict of interests in fact, since none was held to exist in law, between petitioner and his employer, in light of this Court's decision in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud,"* 351 U.S. 525 (1956).

Petitioner did not, however, avail himself of discovery on this issue; instead, his attorney relied upon a tardily submitted hearsay declaration, attributed to the employer's claims manager, that the employer had, as the Second Circuit observed, "a policy of not prosecuting actions based on 33(b) [33 U.S.C. § 933(b)] assignment" (7b). Nothing being presented to the district court fulfilling the requirement of Fed.R.Civ.P. 56, that matters in opposition to a

4. There was a third basis upon which dismissal was urged, having to do with a dismissal of petitioner's prior action against Compass only. This third basis was rejected by the district court, properly so, and, accordingly, no cross-appeal on that ground was taken by respondents. This action, in which Djakarta Lloyd was joined, was begun July 12, 1977.

motion for summary judgment " . . . shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," on December 6, 1978 the action in district court was finally dismissed.

The opinion of the district court can be summarized as holding that where an application for additional compensation benefits is made (in this case for an award, among other things, for permanent partial disability under LHWCA § 908), beyond those sums voluntarily paid under § 914, and the claim is first resisted by the employer and then settled at the recommendation *and* with the approval of a OWCP "claims examiner;" and where the settlement sum is paid by the employer and accepted by the employee who thereafter fails to sue the responsible third-party within six months, all right of the employee against such third parties is assigned to the employer by operation of § 933(b). That is, the district court held that where, as in this case, the parties agreed "by the issuance of a compensation order" to a settlement of a disputed matter of entitlement to further compensation under the auspices of the OWCP and through resort to (and compulsion of) its adjudicative procedures, such compensated employee has thereafter six months (from acceptance) to sue, failing which his third-party rights are assigned to his employer, despite the fact that in this case no formal order was *ever* issued, a shortcoming neither the district court nor the court of appeals thought significant. The district court also held that no conflict of interest between employee and employer should be presumed to exist or be found in law, and that the burden of proof of such conflict sufficient to deny the assignment effect lay with the petitioner, not respondents.

Upon appeal the district court judgment was affirmed, the unanimous Second Circuit Court of Appeals holding

that the "settlement agreement," embodied in the document prepared and signed by the OWCP claims examiner as well as those others concerned, was an "award in a compensation order of the deputy commissioner or [Workmens' Compensation] (sic) Board within the meaning of § 33(b) [33 U.S.C. § 933(b)], triggering its assignment provisions" (8b); and that "failure of an administrator to comply with the formality imposed by departmental regulations . . . of filing the formal order [after the settlement agreement was reached, as required by 20 C.F.R. § 702.315(a)] . . . [could] . . . have no significance as far as the substantive rights of the parties are concerned" (10b-11b). The Second Circuit gave the assignment effect despite petitioner's claim of "interest conflict" arising from an assumption that the employer " . . . often chooses not to antagonize its customer, the shipowner, by bringing suit against it," holding that the six month time period in which to sue provided by § 933(b) was not " . . . unreasonable or harsh under the circumstances" (12b).

Petitioner apparently all but concedes the fact of assignment, that the intervention and active participation of the OWCP and its "claims examiner" constituted *sufficient* participation by the Deputy Commissioner, United States Department of Labor—through his delegee, the claims examiner—so as to make the settlement agreement "a compensation order for all intents and purposes" (16e), and a § 933(b) "award," acceptance of which was sufficient to trigger the beginning of the six month time to sue period.[5]

5. It is not until page 18 of his 19 page petition that petitioner treats of the "procedural" issue of sufficient action by the Deputy Commissioner to trigger the beginning of the six month time to sue provision of § 933(b), since no formal order was ever issued. In so doing, petitioner raises issue of the circuit court of appeals' alleged confusion respecting the offices of the Director of the OWCP and the Deputy Commissioner. Petitioner now argues that the Director may authorize anyone to enter an order, while the Deputy Commissioner, who has the right by statute to enter an order, "may not

So much virtually conceded, petitioner characterizes as "overriding", the issue of whether the assignment should be given effect. In short, petitioner claims the case wrongly decided, on what has been elsewhere called the "revestiture" issue, by both the district court and Court of Appeals; and would prefer the holding of the Fourth Circuit Court of Appeals in *Caldwell* v. *Ogden Sea Transport, Inc.* (and related cases) 618 F.2d 1037 (decided March 27, 1980), of which petitioner makes much in order to demonstrate a conflict between circuits.

The Fourth Circuit Court of Appeals in *Caldwell* and the Second Circuit in the case at bar held that by virtue of LHWCA § 933(b) an assignment had occurred despite which the Fourth Circuit, unlike the Second Circuit, held

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authorize anyone else to do so for him." This rather begs the point. As the district court held and as was affirmed by the unanimous Court of Appeals, the failure to issue an order was a "technical administrative lapse" (9e) in circumstances where: (1) by regulation the claims examiner was empowered (20 C.F.R. § 702.312) to discharge the duties of the Deputy Commissioner, which at the time material to this appeal entailed the power to issue an order on the Deputy Commissioner's behalf, and (2), the Deputy Commissioner (or his § 702.312 delegee, the claims examiner) was "explicit[ly] command[ed]" (6e) by regulation, (20 C.F.R. §702.315(a)), to issue a formal order. This supposed defect in the record of the compensation proceeding was properly held to be of no moment, for reason of the fact by virture of 20 C.F.R. § 702.315(a) the obligation of the employer in agreement to pay arises immediately, independent of any further administrative action, i.e., the issuance of a formal order.

Whatever the significance of the existence, or lack thereof, of a formal order with respect to the availability of further recourse to compensation under the LHWCA, the district court and Court of Appeals properly held that this had *no effect* on the question of the assignment of the "third party" cause of action to the employer. Thus, petitioner cites *Intercounty Construction Corporation* v. *Walter,* 422 U.S. 1 (1975), as he did to the Court of Appeals, ignoring the profound difference in policy considerations underlying the right to recourse to further compensation as opposed to allowing, as the Court of Appeals correctly held, the substantive rights of third parties to be affected by a lapse of responsibility by the Department of Labor, particularly when that lapse had had no practical effect on those first and second parties subject to the compensation proceeding.

that the right of plaintiff to sue allegedly responsible third parties 'revested" as a result of inaction, for whatever reason, of the assignee/employer in failing to bring suit. The issue in this petition is, overwhelming, a question *not* whether assignment occurred in the facts presented as a result of the disposition of the compensation claim of any of the three petitioners, or whether a third party may assert it as a Fed.R.Civ.P. 17 defense; but whether an assignment, having occurred, should be given effect so as to bar suit in their names. The said to be sufficient basis for denying the assignment effect, is a supposed "conflict of interests" between the employee and employer (longshoreman and stevedore), a formerly vital consideration and an important problem for which this Court, by radically different means, twice sought to achieve an acceptable solution. What follows is respondents' attempt to show the Court that "conflict of interests" is, at last, no longer a problem in longshoremen's personal injury cases sufficient to require this Court to presumptively deny effect to an unambiguous provision in an Act of Congress, and why the *apparent* conflict between circuits is at this time no basis for granting a writ of certiorari.

REASONS FOR DENYING THE WRIT

Although petitioner claims a conflict between the Second Circuit Court of Appeals and the Third[6], Fourth[7], Fifth[8] and District of Columbia circuits[9] (*cf.* Petition, page 18),

6. Based on *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) a case interpreting § 933(b) prior to its amendment in 1959, 73 Stat. 391.

7. *Caldwell* v. *Ogden Sea Transport, Inc., supra.*

8. *McClendon* v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965), decided prior to the 1972 Amendments to LHWCA, insulating employers from liability beyond workmen's compensation.

9. *Potomac Electric Power Co.* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965), a case similarly interpreting § 933(b) after the 1959 Amendments, but before renovation of the LHWCA in 1972.

a true conflict exists only between the Second and Fourth circuits, the only courts of appeals which have considered the LHWCA § 933(b) conflict of interests question since the 1972 Amendments. Importantly, this conflict between circuits is theoretical only.

Application of *Caldwell* v. *Ogden Sea Transport, Inc., supra,* and the Second Circuit holding which is the subject of this petition, to the facts presented to the Fourth Circuit Court of Appeals in the *"Caldwell"* group of cases, would achieve the same result—a ruling that dismissal on grounds of the § 933(b) assignment would *not* lie. Respondents contend that the Second Circuit Court of Appeals would *not* agree that the participation in the *"Caldwell"* cases by the Department of Labor, Deputy Commissioner (in fact no participation at all) was sufficient to trigger the § 933(b) assignment.

In no case considered by the Fourth Circuit Court of Appeals was *any* action taken by the Department of Labor through *any* of its agencies. Unquestionably, there was *no* "acceptance of compensation under an award in a compensation order filed by the deputy commissioner or Board..." (§ 933(b)). In every case there was *no* order and *no* award —*only* voluntary payments pursuant to LHWCA § 914. Despite the plain provision of the LHWCA assignment section to the contrary, and after acknowledging the fact that in each *"Caldwell"* case ". . . a workman . . . brought a third person (sic) LHWCA action more than six months after receipt of the last of compensation benefits paid without contravention of liability by an employer or his assured," (618 F.2d at 1040), the Fourth Circuit nonetheless held the § 933(b) assignment "triggered by the uncontested payment of compensation benefits" (*id*). This holding, apparently believed to have been compelled by an earlier opinion of that court in *Liberty Mutual Insurance Co.* v. *Ameta & Co.,* 564 F.2d 1097 (4th Cir. 1977), is clearly error. If this be

so, the Fourth Circuit *unnecessarily* proceeded to consider a "second" question of a concurrent right in the employee and employer to sue third parties after six months, as well as a final or, according to petitioner, "overriding" question, whether, if assigned, the right of action may, as the *Caldwell* court held, be "revested in the longshoreman when it becomes manifest that the assignee [employer], with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason" (618 F.2d at 1046).

On basis of the absence of participation of the Department of Labor in the *"Caldwell"* cases, the Second Circuit would surely find *no* assignment had occurred.[10] On the facts of the case at bar, the Fourth Circuit would, in light of the activities of the board in achieving settlement of petitioner's compensation claim, perforce, hold that an assignment had occurred, but that the right of action against respondents was "revested" as a result of a "presumed. . . conflict of interest" (618 F.2d at 1040) demonstrated by the employer's inaction. If, however, the Second Circuit's holding is correct, petitioner is not aggrieved and as a practical matter no one of the *"Caldwell"* plaintiffs or defendants is aggrieved either. The potential grievance resulting from the theoretical, as opposed to practical, effect of the differing analyses of the Second and Fourth circuits will lie on behalf of: (1) some future third-party who, by virtue of the Fourth Circuit's *Caldwell* reasoning, will be sued by a "revested" employee after a true assignment has occurred in contravention of Fed.R.Civ.P. 17(a),

10. In the case subject to this petition, in district court, Judge Carter correctly held that ". . . as the statute makes clear, mere acceptance of compensation, absent an 'award', does not effect a statutory assignment of the injured party's claim" (12e). For this proposition the district court cited, among other cases, *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947) which cannot be read other than as demonstrating that the Fourth Circuit was wrong in deciding that assignments had occurred.

or (2) an employee improperly deprived of control of his third-party action by virtue of mere acceptance of voluntarily paid compensation, where the employer chooses to assert the § 933(b) third-party claim. Such case is not before the Court, and may never be.

As the Fourth Circuit might be seen to have achieved the right result as a result of consecutive errors, a comparison of that decision and the opinion of the Second Circuit is invited. Such comparison, respondents submit, will demonstrate why *Caldwell* was wrongly decided. There is: (1) no basis for saying on the *"Caldwell"* facts that the § 933(b) assignment provision was ever triggered; or (2) that revestiture by mere inaction by the assignee/employer, which clearly contravenes the plain meaning of an Act of Congress, has any support in § 933(b) or in any currently apposite case; and (3) such holding is in conflict with Fed.R.Civ.P. 17 and the purpose of Congress in enacting the 1959 and 1972 Amendments to the LHWCA, and by the latter all but totally renovating the law applicable to longshoremen's personal injury cases.

It should be initially appreciated that the Second Circuit applied the language of § 933(b) to the facts both in their "procedural" aspect, i.e. in determining when and in what circumstances an assignment occurs, as well as with respect to its "substantive" aspect—that the fact of assignment establishes a right of a third-party to assert a Fed.R.-Civ.P. 17 real party in interest defense. In short, the Second Circuit applied the law while the Fourth Circuit, needlessly, found a "solution," one mistakenly said to be "building upon" (618 F.2d at 1044) and, in fact, improperly extending, this Court's holding in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud," supra.*

Respondents submit that *Czaplicki* was the capstone of efforts by this Court to overcome a conflict of interests problem introduced into the law of the longshoremen's and

harbor workers' personal injury cases by amendment to the LHWCA § 933(b) in 1938, 52 Stat. 1168. Read literally, *Czaplicki* addresses the interests conflict question between the employer and employee under the LHWCA from the perspective of concern that employers would not sue on the § 933(b) assignment (351 U.S. at 531), and to that extent is directly relevant to the present problem of employers' inaction. But *Czaplicki* should be seen as an expression of concern about much more, and as a response of the Court to a peril to an injured longshoreman's third-party action far graver than the threat of mere inaction by the assignee/employer in failing to sue as a result, for example, of a desire to maintain customer relationships.

In 1956 at the time of this Court's *Czaplicki* decision, employers had no less than the power under § 933(b) to deny an injured employee either his right to compensation, or control of his third-party cause of action. This was because assignment of the third-party cause of action, as § 933(b) LHWCA read after amendment in 1938, depended only upon acceptance of compensation pursuant to an "award." In such circumstances, in order to cause an assignment, the employer needed only to force the compensation board to order payment of benefits by unjustifiably refusing to pay compensation in the first instance. As a result, an employee, taking every step to preserve his third-party claim short of the desperate measure of foregoing compensation while totally disabled, could nonetheless be deprived of control of his suit. After this Court's decision in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), his retention of control was vital, since his suit in the hands of his employer would have been a suit by his assignee seeking recovery of damages from itself.

But by virtue of the 1959 Amendments to § 933(b), 73 Stat. 391, providing six months to sue after acceptance of

an "award" of compensation, no vigilant employee can now be deprived of his right to sue, even if he also chooses to exhaust his compensation entitlement. As *Czaplicki* responded to a conflict of interests problem presented in *every* post-*Ryan* longshoreman's action, and since it was designed not just to save control of a longshoreman's suit from the consequences of his inattention, but to prevent improper interference by his employer having power as a practical matter to compel an assignment, this case can only be seen as *the* high-water mark beyond which this Court, when presented with a far more pervasive and serious problem than that which courts today confront, was unwilling to go (see 351 U.S. at 532). It cannot, therefore, be properly seen as a holding which in present circumstances can be properly "built upon," to achieve the solution sought by the Fourth Circuit in *Caldwell,* i.e., "revesting" of the assigned third-party cause of action in the employee as a result of the employer's failure to sue on account of an alleged conflict of interests presumed merely from that fact.

Mere disinclination on the part of the employer to sue was, however, a matter *also* dealt with by Congress in amending § 933(b) in 1959. And although the Fourth Circuit's *Caldwell* holding is clearly based upon the belief that "... it certainly cannot be thought to have been intended by Congress that the longeshoremen's substantive [third-party] right might be lost simply through inaction by the assignee ..." (618 F.2d at 1045), any such intention to preserve to the employee the third-party right in all circumstances is nowhere affirmatively expressed. This fact is important since Congress acted in the area of "incentive to employers to protect the interests of the employee as much as possible" in suit on the § 933(b) assignment by, in 1959, enacting § 933(e)(2), giving the employer a right to retain one-fifth of any sum recovered in excess of compensation benefits paid or owed. See S. Rep. No. 428, 86th Cong., 1st

Sess. reprinted in [1959] U.S. Code Cong. and Ad. News 2134-35. Congress having acted to provide incentive for § 933(b) suits, this incentive should be deemed the sufficient "guarantee" of the employee's interest in having LHWCA § 933(b) suits brought by his employer. In evaluation of the appropriateness of the absolute guarantee achieved by the Fourth Circuit in *Caldwell,* courts should heed this fact, and this Court should view the Fourth Circuit holding on the "revestiture" issue as what it is—plain error.

In so extending *Czaplicki* the Fourth Circuit additionally mistook the development of the law of maritime personal injuries involving harbor workers as affected by LHWCA § 933(b) through its various amendments, as well as the reason why *Czaplicki* was a required holding in 1956 and is today no longer needed.

The LHWCA was enacted in 1927, 44 Stat. 1440, and originally provided a most sharply restricted right on behalf of covered employees to sue "third parties."[11] Section 933(a) of the LHWCA as originally enacted provided to a covered employee an election between a third-party claim for damages or compensation, while § 933(b) in its original form provided for an assignment of the employee's third-party rights to the employer upon *mere payment* of benefits. *Bloomer* v. *Liberty Mutual Ins. Co.,* — U.S. — , 100 S.Ct. 925, 63 L.Ed. 2d 215 (1980). As a result of the original language of §§ 933(a) and (b) there was *no* conflict of interests of any legal significance between employee and employer.

11. Any sensible interpretation of longshoremen's third party actions must acknowledge that the employee's right to sue those responsible for a compensable injury has *always been* a restricted right. It should follow, in light of the extraordinarily generous benefits available in compensation to covered employees, that there is no present reason to view the remaining modest restriction as in any way inappropriate or oppressive.

In 1938, however, in response to criticism that longshoremen entitled to voluntary compensation under § 914 of the Act were improperly being deprived of their third-party rights as a result of failing to appreciate the effect of acceptance of such compensation on the right to sue a negligent third-party,[12] Congress amended § 933(b) (and 933(b) *only*) to provide for an assignment when such compensation had been paid: "under an award in a compensation order filed by the deputy commissioner." This change presented the potential of an employee/employer (longshoreman/stevedore) conflict of interests, in light of this Court's interpretation of the purposes of Congress in enacting the 1938 Amendments.

Despite the fact that the 1938 Amendment to § 933(b) was arguably designed only to prevent a forfeiture of the third-party claim where an employee, intending to sue, unwittingly accepted voluntary compensation, this Court in *American Stevedores, Inc.* v. *Porello, supra,* held that Congress intended the 1938 Amendment to accord to an injured employee a right both to accept voluntarily paid compensation and to maintain a third-party suit for damages against, for example, a negligent shipowner, despite the fact that § 933(a) had not been amended and continued to provide that an injured employee must elect between compensation and suit for damages.[13] Elsewhere in its opinion, the Court held that if the contract for stevedore services entered into between the parties before the Court (the shipowner and the stevedore) was not controlling, the district

12. See *Cupo* v. *Isthmian S.S. Co.,* 56 F. Supp. 45 (S.D.N.Y. 1941) and H.R. Rep. No. 1945, 75 Cong., 3rd Sess. (1938), which accompanied legislation amending § 933(b) in 1938.

13. For suggestion of the possibility of an appropriate, less expansive interpretation, see *Toomey* v. *Waterman S.S. Corporation,* 123 F.2d 718 (2d Cir. 1941) (dictum). The justice of this Court's more liberal interpretation of the purpose of Congress in enacting the 1938 Amendment to § 933(b) defies challenge if considered in light of the remedial purposes of the LHWCA and the modesty of the then available benefits.

court ". . . would, of course, be free to adjudge the responsibility of . . . [those] . . . parties . . . under applicable rules of admiralty law." 330 U.S. at 458.

In *American Stevedores, Inc.* v. *Porello,* this Court in addition to holding that an injured longshoreman could sue, despite acceptance of voluntarily paid compensation, and need not, prior to accepting an "award" of compensation, elect between remedies, at least powerfully suggested that the burden of such third-party suits be borne on the basis of some form of contribution by the stevedore, perhaps according to its proportionate fault.[14] This interpretation of the reach of the 1938 Amendments raised a conflict of interests and a serious one, in light of the power of the employer to deprive the employee of either his compensation right or his third-party action by the expedient of "forc-[ing] an award," a possibility acknowledged by the *Porello* court, 330 U.S. at 455, although the full implications following from that fact were seemingly not at that time clearly perceived.

As the LHWCA read after 1938, the compensation entitlement of the employee was necessarily uncertain, and his practical ability to make claim for it without hardship most tenuously established, because certainty (i.e. determination of extent) meant an "award" of compensation and, hence, assignment of the employee's third-party claim, while mere threat of "forcing an award" held potential of discouraging compensation claims in the first instance, at least in situations where the employee believed himself possessed of a valid third-party claim.[15] As a result of these unfortunate facts, extending a right of contribution against

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14. See, *In Re Seaboard Shipping Corporation,* 449 F.2d 132 (2d Cir. 1971).

15. LHWCA § 933 (d) then and now empowers the employer to compromise the whole § 933(b) claim, including the employee's statutorily established interest in the "excess," § 933(e). This the employer could do to the disadvantage of the employee.

the employer to the third-party, on basis either of proportionate fault or the admiralty moiety rule of divided damages (See 330 U.S. at 458) created a conflict of interests to which the LHWCA, as then drafted, could not adequately respond.

In *Baccile* v. *Halcyon Lines,* 187 F.2d 403 (3rd Cir. 1951) (reversing 89 F. Supp. 765 (E.D.Pa. 1950)), the inappropriateness of contribution in longshoremen's personal injury cases, (since creating a conflict of interest between the employee and employer), was pointedly demonstrated. This Court responded appropriately in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952) (reversing *sub. nom* 187 F.2d 403 (3rd Cir. 1951)), holding that contribution was unavailable in all maritime law cases except those involving collision. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* whatever else it was intended to achieve, all but cured the conflict of interests created by the 1938 Amendments as interpreted by this Court in *American Stevedores, Inc.* v. *Porello.* And what remained to be achieved in order to encourage stevedores to make the voluntary payment of compensation required by LHWCA § 914 and to secure a longshoreman's dual right to accept voluntary compensation and sue for damages was soon accomplished.

Shortly thereafter, this Court's *Halcyon* rule was extended in *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953), a case in which this Court completely overcame the conflict of interests problem by depriving the shipowner of its sole remaining avenue of relief from imposition of the full burden of a longshoreman's "damages," by refusing to permit reduction of the shipowner's liability to injured longshoremen by the extent of the *then* "uncertain" (See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. at 284) compensation liability of a concurrently negligent stevedore.

Halcyon (as abridged) is today good law, whenever the party against whom damages are sought is "shielded by" LHWCA § 905. (*Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974)); and applies, or would have, in any case brought by a stevedore in its own right to recover its compensation liability from a shipowner, *Federal Marine Terminals Inc.* v. *Burnside Shipping Co., Ltd.*, 394 U.S. 404, 417-418 (1969). It might be that the same cannot be said for this Court's *Pope & Talbot* holding, at least to the extent the decision in that case touched upon, or was motivated by, concern about the question of the "conflict of interests" in the aftermath of the 1938 Amendments to § 933(b). In *Pope & Talbot* this Court, apparently acting upon the belief that the employer paying benefits under the LHWCA was entitled to assert a "lien" on the proceeds of a compensated employee's suit,[16] denied the shipowner a reduction of liability owed the longshoreman by the amount of the uncertain compensation liability of the stevedore, since in this Court's view such result represented "the substantial equivalent of contribution." (346 U.S. at 412).

In any event, both *Halcyon* and *Pope & Talbot* represented efforts by this Court to exclude any possibility of conflict of interests between an employee and employer. This approach, insulating the stevedore from all liability where the shipowner was liable to the longshoreman, worked, of course, but had an unwelcome side-effect: negli-

16. See *The Etna*, 138 F.2d 37 (3rd Cir. 1943). But also see *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D.N.Y. 1952) (Weinfeld, J.), aff'd, 205 F.2d 151 (2d Cir. 1953), where the employer's lien on proceeds was justified not only on the basis of prevention of a "double recovery" by a compensated longshoreman as a result of his third-party suit, but by the presumed effect of the 1938 Amendments, cutting-off the employer's right to sue where compensation was paid without an award and thereby depriving the employer of an adequate remedy at law. Hence, the characterization of the stevedore's "lien" as "equitable." See as well, *Bloomer* v. *Liberty Mutual Ins. Co., supra.*

gent stevedores routinely escaped even their compensation liability, thereby imperiling the safety of longshoremen. But the next step in the development of the law of longshoremen's personal injury cases, and with it the maritime law in general, reintroduced the by now familiar "conflict of interests" problem.

In 1956, in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), a case which preferred consideration of the safety of longshoremen to all else, this Court held stevedores liable to shipowners, not for contribution but for indemnity, not on account of and to the extent of concurrent fault, but for breach of warranty of workmanlike service. By making the stevedore potentially liable, not just for part of a longshoreman's damages *(Halcyon)* or, as a minimum, its compensation liability *(Pope & Talbot)*, but for the total amount of the shipowner's liability to the longshoreman (in addition, by extension never sanctioned by this Court, to the shipowner's costs of defense in the way of attorneys' fees), *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.* restored full blown the conflict of interests introduced into the LHWCA by the 1938 Amendment to § 933(b). The practical implications following from this fact were eloquently (and, of course, accurately) described by Mr. Justice Black in his *Ryan* dissent, 350 U.S. at 135-147.

On October 24, 1955, fourteen days after rehearing in *Ryan Stevedoring Co., Inc.*, this Court granted certiorari (350 U.S. 872 (1955)) in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud," supra.* This case had been dismissed in the district court on the basis of the § 933(b) assignment, a formal order awarding compensation having been filed by the deputy commissioner (110 F. Supp. 933 (S.D.N.Y. 1952)). On appeal (223 F.2d 189 (2d Cir. 1955)) the judgment of dismissal was affirmed on grounds of laches, the case having been begun seven years after the occurrence of injury. In that case compensation payment totalled but $160.72.

Before determining the issue of laches to be a question of fact for the jury and therefore requiring reversal on that ground if no other, this Court held that although an assignment had occurred it could not be given effect. This judicial repeal of § 933(b) was justified on grounds that:

> [T]he statute presupposes that the assignee's [stevedore's] interests will not be in conflict with those of the employee . . . [and] where there is such a conflict of interests, the inaction of the assignee operates to defeat the employee's interest in any possible recovery. Since an action by Travellers [the stevedore's compensation insurer] would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally. 351 U.S. at 531.

It is apparent that *Czaplicki* represented the *second* choice of this Court, a cure for a problem which it first tried to avoid by excluding all possibility that a conflict would arise, and an *alternative*[17] means to ensure that the flaw in § 933(b) introduced by virtue of the 1938 Amendments could not be exploited to deprive an injured longshoreman, in days of inadequate compensation benefits, of either his right to compensation or suit against a responsible third-party.

American Stevedores, Inc. v. *Porello; Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.; Pope & Talbot Inc.* v. *Hawn;* and *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud,"* were all correctly decided. Longshoremen formerly desperately needed a right to sue because of the inadequacy

17. The forebearance demonstrated by this Court, in initally declining the option of refusing to enforce an Act of Congress, (§ 933(b)), despite what proved to be irresistable reason to adopt this solution, is a fact properly to be considered in evaluating the Fourth Circuit's lack of any similar restraint in *Caldwell* v. *Ogden Sea Transport, Inc., supra.*

of the compensation remedy. And the right to sue and obtain compensation could not be adequately guaranteed by this Court, except on terms *either* of insulation of the stevedore from *any* liability where a third-party was responsible for an employee's injury; *or* repeal of the imperfectly amended § 933(b) in order to respond to Congress' purpose, identified in *American Stevedores, Inc.* v. *Porello, supra,* as an extension to those covered by the LHWCA of a right to voluntarily paid compensation benefits *and,* where appropriate, damages from a third-party.

But today, *Czaplicki* is not needed. The conflict of interests exception, barring effect to the § 933(b) assignment, is no longer required, by virtue of the combined effect of amendments to § 933(a) and (b) in 1959, and the 1972 Amendments limiting the stevedore's liability to compensation.

The LHWCA was amended in 1959 (73 Stat. 391) to provide that the employee "need not elect," 933(a), and that the employee's third-party right was assigned only after lapse of six months from acceptance of an award without suit, § 933(b). And although the 1972 Amendments (86 Stat. 1262), did not significantly affect § 933(a) or (b), the principal 1972 LHWCA Amendment from the shipowner's perspective, § 905(b), insulated the employer from liability for "such damages" of its injured employee or "anyone otherwise entitled to recover damages" by reason of injury to such employee caused by third-party negligence.

As a result of the 1972 Amendments, concern over any *Halcyon* inspired conflict of interests induced by threat of contribution is surely misplaced; whereas the *Pope & Talbot* concern, that the stevedore might minimize its "contribution" in potential relief of a shipowner's burden of damages and unfairly deprive a longshoreman of compensation by threatening to "force an award," is obviated by the present § 933(b) six month grace period. Of course,

the "conflict of interests" threat created by *Ryan* indemnity (and overcome by *Czaplicki*) is now, too, an historical curiosity. The stevedore has neither motive (by virtue of the 1972 Amendments) nor power (by virtue of the Amendments to § 933 in 1959), to interfere in a longshoreman's suit or attempt to minimize its compensation liability, which can now be made certain without loss of right to sue.

Caldwell v. *Ogden Sea Transport, Inc., supra,* to the extent it "solves" the LHWCA § 933(b) assignment provision/conflict of interests problem does so after the fact. Any supposed conflict of interests presented in these cases today, where an assignment has occurred by provision of § 933(b), is no more than that which existed between 1927 and 1938 under § 933(b) as originally enacted. This is the "conflict" arising from what is thought to be the reluctance of stevedores to sue their shipowner customers (See 12b and *Valentino* v. *Rickners Rhederei,* G.M.B.H., 552 F.2d 466 (2d Cir. 1977)). Indeed, the conflict of interests between employer and employee is now less: the stevedore has vastly more at stake—compensation benefits were most dramatically increased in 1972 and the stevedore is typically the principal beneficiary of the third-party action, whether or not brought before six months of acceptance of an award of compensation.

This enduring "conflict" is, in law, no conflict at all, as it must necessarily be seen to be within the tolerance contemplated by Congress; this "conflict" existed at the beginning and continues, despite amendments to the applicable LHWCA §§ 933(a) and (b) in 1938, 1959 and 1972, no one of which can be read as suggesting repeal of the assignment section.

There may be, however, reason beyond natural reluctance (see *Valentino* v. *Rickners Rhederei, G.M.B.H., supra)* of the stevedore to sue its customers. If stevedores do not

bring § 933(b) actions, assuming that this is so, or will prove true, that fact may demonstrate an additional Fed. R.Civ.P. 17 reason why the longshoremen should not be "revested" with the third-party action upon inaction of the stevedore.[18]

Fed.R.Civ.P. 17 affords a defendant not only "freedom from multiplicity of suits based on the same claim," as the Second Circuit held (7b), but an opportunity to present any evidence or defenses it has against the real party in interest. *Celanese Corp. of America* v. *John Clark Industries, Inc.*, 214 F.2d 551, 556 (5th Cir. 1954); *Virginia Electric & Power Co.* v. *Westinghouse Electric Corp.*, 485 F.2d 78, 84 (4th Cir. 1973). Under *Caldwell* and the view of the Second Circuit Court of Appeals, since both hold that an assignment had occurred, if the stevedore's § 933(b) suit is allowed to revest in the employee a third-party may be deprived of a defense available to it, if no revestiture is

18. The first reason is that the *Caldwell* result ignores the possibility that a longshoreman's personal injury case will be without merit. If mere inaction by the employer "revests" the action in the longshoreman, his employer need not make any ethical or business judgment regarding the merits, or lack thereof, of its employee's claim. Under such a result the stevedores will not have power to prevent prosecution of a third-party claim known to it to be invalid.

A second reason is that there is nothing at all wrong in the stevedore's wishing to discourage, to its initial economic disadvantage, third-party cases against its customers, where an injured employee has been, or can be made, substantially whole by the generous benefits the LHWCA now provides. Such motive comports fully with Congress' intention that longshoremen prefer compensation where appropriate, in order to reduce the cost to the maritime industry of third-party claims, as well as the burden upon the courts such cases have traditionally represented, although "seldom result[ing] in a real increase in actual benefits (sic) for injured workers." See S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 4 (1972). This point has particular force in light of the result sanctioned recently by this Court in *Bloomer* v. *Liberty Mutual Ins. Co.*, *supra*, which makes the longshoreman's first cent of additional recovery by means of his third-party action dependent upon the judgment or settlement being more than half-again greater than compensation benefits already received.

seen to have occurred, and the stevedore force to sue on its § 933(b) assignment.

By virtue of this Court's holding in *Federal Marine Terminals Inc.* v. *Burnside Shipping Co., Ltd., supra, if* the 1972 Amendments to the LHWCA do not, in effect, prevent today the bringing of a suit by the stevedore in its own right against the shipowner, such suit would be subject to the rule of *Halcyon.* But if the longshoreman sues prior to the lapse of six months from an "award" or after the action is revested in him by the stevedore's inaction in failing to sue the shipowner, the stevedore's concurrent negligence is no bar to recovery. In such case, the shipowner would not be allowed by virtue of *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), to assert concurrent stevedore negligence as either a partial or complete defense to a longshoreman's § 905(b) claim. And by virtue of *Pope & Talbot, Inc.* v. *Hawn, supra,* in such suit in the name of the compensated employee, the shipowner would also be unable to assert concurrent negligence in defense to the stevedore's claim of "lien" and, hence, would not be able to reduce its liability to the longshoreman by the amount of the (now subject of being made certain) compensation liability of the stevedore. To the extent that § 933(e)(1)(C) and (D), afford an employer recovery of its common law damages, (compensation paid *and* owed), which the stevedore can, or once could, recover in a *Federal Marine Terminals* v. *Burnside* action subject to the complete defense of its concurring negligence, a stevedore's § 933(b) suit might properly be seen as subject to the same defense. Thus, whether the shipowner is liable to repay to a negligent stevedore its compensation liability, or any part thereof, might be dependent upon who sues. See, *Landon* v. *Lief Hoegh And Co., Inc.,* 521 F.2d 756 (2d Cir. 1975), certiorari sought on other grounds and denied, 423 U.S. 1053 (1976), reh. den. 424 U.S. 935 (1976).

The Fourth Circuit's *Caldwell* "revestiture" holding, *broadening* the *Czaplicki* exception is unsupportable for the following reasons: (1) that the LHWCA originally provided that such right was lost merely by acceptance of any compensation; (2) decisions prior to *Czaplicki* in 1956, for a period of nearly 30 years following the enactment of the LHWCA in 1927, uniformly held that where, on the facts, an assignment had occurred an employee's suit was barred on that basis; (3) *Czaplicki* was not based on any conviction that Congress had had an intention to preserve the third-party claim in all instances, but, rather, that it was necessary to deny effect to such assignment in order to serve Congress' purpose that the employee have both compensation and a right to sue, when a change in law, would have, in effect, withdrawn one or the other entitlement; (4) the substantive third-party right for which the Fourth Circuit Court of Appeals holding reflects such concern, is now of significantly less value to the employee than it was prior to 1972 as a result of the dramatic recent increase in compensation benefits, while the incentive of the employer to sue on the § 933(b) assignment is accordingly greater and that of the employee to prevent an assignment less; and, (5) giving the employee opportunity to show a conflict of interests, as a matter of fact, between himself and his employer is, if anything, more protection than Congress intended, to preserve the third-party rights of an injured longshoreman.

CONCLUSION

The analysis of the issues by the Fourth Circuit Court of Appeals is all but completely erroneous. Proper deference to the 1938 Amendents to LHWCA § 933(b) and to this Court's holding in *American Stevedores, Inc.* v. *Porello, supra,* compels the conclusion that the Fourth Circuit mistakenly viewed mere acceptance of voluntarily paid compensation benefits as sufficient to trigger the statutory six-month time to sue provision. Having erred initially, that court proceeded to achieve a correct result by the only means available, by also failing to understand the reason for so-called "exception" to enforcement of a § 933(b) assignment created by this Court in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud," supra.* The Fourth Circuit failed to perceive why the holding of that case was once so necessary and why it can no longer be justified.

But if anything the most egregious error of the Fourth Circuit Court of Appeals was in failing to appreciate the enormous implications which follow from the fact that the LHWCA, by virtue of the 1972 Amendments, extends today inflation-proof compensation benefits of unprecedented generosity. By virtue of this fact, it is surely not inappropriate for *some* restriction to be placed on the third-party suits, if only to avoid the waste to all concerned in the industry of prosecution of afterthought cases of dubious merit, particularly when, if the employee is encouraged to exhaust his compensation entitlement, suit against a shipowner for "damages" for which he can be made essentially whole through compensation, may be redundant. It is simply inappropriate for courts *now* to rescue third-party cases from the consequences of a longshoreman's inattention at the cost of doing violence to an act of Congress.

There being no petitioner with a proper grievance before the Court, the petition should be denied.

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